88-115

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LTD., ET AL.,
Petitioners,

vs.

STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING,
Respondent.

PETITION OF THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LTD., ET. AL., FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit Court of Appeals erred in ruling that a foreign arbitration clause contained in the charter party and incorporated into the bill of lading was unenforceable.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners: The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited ("U.K. Club"); Pateras Brothers, Ltd.; Pateras Investments, S.A.; Kittiwake Compania Naviera, S.A. ("Kittiwake"); M/V Wesermunde; Marquis Compania Naviera, S.A. and the Respondent: State Establishment for Agricultural Product Trading ("State Establishment").

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PETITION OF THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LTD., ET. AL. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners' respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on March 11, 1988.

OPINIONS BELOW

The opinion below consists of the following decisions (listed chronologically).

1. Order of August 21, 1984 entered by the United States District Court for the Middle District of Florida, Tampa Division. (Appendix Item E).
2. Order of February 28, 1986 entered by the United States District Court for the Middle District of Florida, Tampa Division. (Appendix Item D).
3. Order of May 4, 1987 entered by the United States District Court for the Middle District of Florida, Tampa Division. (Appendix Item C).
4. Opinion of March 11, 1988 of the United States Court of Appeals for the Eleventh Circuit. *State Est. for Agr. Prod. Trading v. M/V WESERMUNDE*, 838 F.2d 1576 (llth Cir. 1988). (Appendix Item A).
5. Order of April 18, 1988 denying Petition for Rehearing. (Appendix Item F).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit sought to be reviewed in this case was entered on March 11, 1988. A timely petition for rehearing was denied on April 18, 1988, and this petition for certiorari will be filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(l).

STATUTORY PROVISIONS INVOLVED

The Arbitration Act, 9 U.S.C. §§ 1-14 (1970) and the Carriage of Goods by Sea Act, 46 U.S.C. § 1300-

1315 (1975). The pertinent portions of the above statutes are set forth in Appendix G to this petition.

STATEMENT OF THE CASE

On March 30, 1982, 82,073 cases of fresh eggs owned by STATE ESTABLISHMENT were loaded onboard the M/V WESERMUNDE at Tampa, Florida, for carriage to Aqaba, Jordan. After the vessel arrived in Aqaba on April 20, 1982, fire broke out on the vessel on May 6, 1982 and the cargo was destroyed.

The eggs were shipped pursuant to a charter party. (Appendix Item H). A bill of lading was issued that incorporated the charter party between Marquis Compania Naviera, S.A. and Murray Clayton, Limited, dated December 18, 1981. (Appendix Item I). The charter party contained an arbitration clause which provided:

> "Any dispute arising under this charter party to be settled by arbitration in London (not lawyers) according to the Arbitration Act."

On May 4, 1983 STATE ESTABLISHMENT instituted a suit for cargo damage against the M/V WESERMUNDE, her engines, tackle, etc., in rem, THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LTD. ("U.K. CLUB"), and other defendants in personam, for damages arising out of the loss of the cargo of eggs.

On July 12, 1984 the Petitioners, with the exception of the U.K. CLUB, filed motions to arbitrate the dispute in London, England, and to stay the present

litigation pending the outcome of that arbitration. On August 21, 1984, the court granted the motion and ordered the parties to arbitrate in London, England, staying all further proceedings pending arbitration. Arbitrators were appointed in London, however Respondent chose not to submit a claim. Its subsequent motion to lift the stay was also unsuccessful.

On January 20, 1987 the Petitioners moved the District Court to dismiss the action against by STATE ESTABLISHMENT for lack of prosecution. On April 21, 1987 the District Court ordered STATE ESTABLISHMENT to show cause why this action should not be dismissed for want of prosecution. Respondent replied to the court's order to show cause on April 27, 1987 by stating that it would not arbitrate and that the case should be dismissed so that an appeal would be appropriate. On May 4, 1987 the District Court entered an order dismissing STATE ESTABLISHMENT'S claim against the Petitioners with prejudice for its failure to arbitrate in London, England. The Respondent subsequently appealed to the Court of Appeals for the Eleventh Circuit and on March 11, 1988, following briefing and oral argument, the Court of Appeals reversed the District Court's order dismissing State Establishment's claim and remanded the case.

On March 30, 1988 the defendants submitted their petition for rehearing of the case to the United States Court of Appeals for the Eleventh Circuit and that petition was denied on April 18, 1988.

REASONS FOR GRANTING THE WRIT

a. The federal policy favoring arbitration established by Congress and supported by this Honorable

Court has been undermined by the Eleventh Circuit's decision below.

The Eleventh Circuit, in its decision, interpreted a contract between the parties in such a way as to be contrary to the statutory federal policy favoring arbitration and the decisions of this Honorable Court. The Eleventh Circuit disregarded this Court's decisions reflecting and implementing a congressional policy favoring arbitration and has disregarded the will of Congress by displaying a "judicial hostility to arbitration agreements."

WESERMUNDE[1] is exactly the type of situation Congress intended to be controlled by 9 U.S.C. § 1 *et seq.* It grows out of a maritime transaction and a contract evidencing a transaction involving commerce. In *Moses H. Cone Memorial Hosp. v. Mercury Const.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983), the court stated:

> Section 2 is the primary substantive provision of the Act, declaring that a written agreement to arbitrate "in any maritime transaction or contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements.
> . . .

Shearson/American Exp, Inc. v. McMahon, ___ U.S. ___, 107 S.Ct. 2332 (1987), is this Court's most recent

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[1] *State Est. for Agr. Prod. Trading v. M/V WESERMUNDE*, 838 F.2d 1576 (11th Cir. 1988).

expression of the concept that the Arbitration Act establishes a "federal policy favoring arbitration." *Id* at 2337. In *Shearson*, the court cites *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449 (1974), ("[W]e hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act." *Id.* 94 S.Ct. at 2457.) *Moses H. Cone Memorial Hosp. v. Mercury Const.*, 460 U.S. 1, 103 S. Ct. 927, (1983), ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements . . ." *Id.* 103 S.Ct. at 941.) *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 105 S. Ct. 3346 (1985) ("... emphatic federal policy in favor of arbitration. . ." *Id.* 105 S.Ct. at 3356-7) and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238 (1985) ("[W]e rigorously enforce agreements to arbitrate . . ." *Id.* 105 S.Ct. at 1242) for the proposition that arbitration will be enforced liberally and rigorously.

The decision of the Eleventh Circuit indicates that the court felt that enforcement of a foreign arbitration clause deprived STATE ESTABLISHMENT from a right to its day in court. This view runs contrary to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* as explained in *Scherk v. Alberto-Culver*, *supra*, 417 U.S. at 510, 94 S. Ct. at 2453, where the court pointed out that one of the purposes of the Act was to "revers[e] centuries of judicial hostility to arbitration agreements." The Eleventh Circuit opinion evidenced the very judicial hostility to arbitration that Congress was attempting to overcome.

The doctrine favoring arbitration was further defined in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, supra*, 473 U.S. at 627, 105 S. Ct. at 3354 (1985) wherein the court stated:

> Just as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.

The Eleventh Circuit disregarded this statement by the Supreme Court and construed the intentions of the parties against arbitrability wherever possible. In *Mitsubishi Motors*, the court was dealing with the question of international commerce and pointed out that the federal policy favoring arbitration applies with special force in this area.[2] *Id.* 473 U.S. at 631, 105 S. Ct. at 3356.

Congress clearly intended that the national policy favoring arbitration would apply to "maritime transactions" since they are specifically named in 9 U.S.C. §§ 1 and 2. The Eleventh Circuit by its decision has excluded an entire class of maritime transactions from arbitration.[3] contrary to the intent of Congress in enacting 9 U.S. § 1 *et seq.*, as noted by the Second Circuit in *Indussa Corporation v. S.S. RANBORG*, 377 F.2d 200, 204 n. 4 (2d Circuit. 1967), and con-

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[2] *WESERMUNDE* involves an international transaction relating to a cargo of eggs that were sold by a foreign shipper to a foreign receiver and carried aboard a foreign flag vessel. None of the parties in this action is a United States resident or citizen.

[3] The Eleventh Circuit apparently would refuse to enforce an arbitration provision in any contract of carriage where the Carriage of Goods by Sea Act, 46 U.S.C. 1300 et seq. applied as a matter or law or as a matter of contract.

trary to the mandate set forth by this Honorable Court in the cases cited above.

b. The Eleventh Circuit's decision not to enforce an arbitration clause contained in a charter party and incorporated by reference into the Bill of Lading directly conflicts with the rulings of the courts in other circuits.

The decision by the Eleventh Circuit has created a lack of uniformity in the circuits relative to the question of whether a holder of a bill of lading that incorporates a charter party is bound by an arbitration provision in said charter party. The First, Second, Fifth and Ninth Circuits have each decided similar issues contrary to the ruling of the Eleventh Circuit decision in WESERMUNDE.

The pre-eminent case in this area was decided in the Second Circuit in *Son Shipping v. De Fosse & Tanghe*, 199 F.2d 687 (2d Cir. 1952). In that case, the court held that where the terms of a charter party requiring arbitration in New York were incorporated by reference into the bill of lading, "they [were] a part of the contract and were binding upon those making a claim for damages for the breach of the contract just as they would be if the dispute were between the charterer and the shipowner." *Id.* at 688. The *Son* case has been cited repeatedly to support the doctrine that arbitration will be enforced in those cases where it is set forth in a charter party, which in turn is incorporated by reference into the bill of lading.

The case of *Indussa Corporation v. S.S. RANBORG*, 377 F.2d 200 (2d Cir. 1967), not an arbitration case, was cited by the Eleventh Circuit as supportive

of its decision. This reliance was misplaced. The Second Circuit found that a forum selection clause was violative of COGSA because it required the Plaintiff to appear before a judicial tribunal in a foreign country, however, the court noted:

> Our ruling does not touch the question of arbitration clauses and bills of lading which require this to be held abroad . . . if there be any inconsistency between the two acts, presumably the Arbitration Act would prevail by virtue of its re-enactment as positive law in 1947, 61 Stat. 669.

Id. at 204 n. 4.

The law of the Second Circuit as derived from *Son Shipping* and *Indussa* makes it be clear that a bill of lading that incorporates a charter party requiring foreign arbitration will be binding on the holder of said bill of lading. There is a direct conflict between the ruling of the Eleventh Circuit in this case and the *Son Shipping* and *Indussa* line of cases which requires clarification by this Honorable Court.

The law of the Fifth Circuit also conflicts with the WESERMUNDE decision. Subsequent to the ruling below, a district court in the Fifth Circuit was presented with a similar situation and asked by the Plaintiff to follow the WESERMUNDE decision in *AIU Insurance Company and Nissho Iwai Corporation v. M/V STAMY*, Civ. No. 85-0706 (E.D. La. June 24, 1988) (Appendix Item B). The court, noting that *WESERMUNDE* was not binding authority, stated:

> [We find] more persuasive the reasoning set forth in *Tai-Ping Insurance Company v. the M/V WARSCHAU*, 731 F.2d 1141 (5th

> Cir. 1984). That circuit court held that the district court abused its discretion by staying arbitration being held pursuant to an arbitration clause validly incorporated in the charter party agreement which governed cargo disputes.

The District Court for the Eastern District of Louisiana cited *Associated Metals and Minerals Corp. v. M/V VENTURE*, 554 F. Supp. 281 (E.D. La. 1983) as the law of the Fifth Circuit. *See also, Mitsubishi Shoji Kaisha, Limited v. M/S GALINI*, 323 F. Supp. 79 (S.D. Tex. 1971).

The First and Ninth Circuits have also followed the rule of the *Son Shipping* case: *Castle & Cooke, Inc. v. Etoile Shipping Co., Limited*, 622 F. Supp. 609 (D. Puerto Rico 1985) ("To compel arbitration pursuant to a clause in a charter party it is not necessary for the claimant to be a party to the charter agreement. It is enough that the clause was unequivocally incorporated in the bill of lading and the shipper was aware of the incorporation." *Id.* at 610) and *Michael v. S/S THANASIS*, 311 F. Supp. 170 (N.D. Cal. 1970) (Rule of *Son Shipping* cited and regarded by court "as a correct statement of the law . . ." *Michael, supra*, at 173.). These rulings again conflict with the decision of the Eleventh Circuit below.

In brief summary, the Eleventh Circuit's opinion below conflicts with the decisions of all of the circuits that have been confronted with the arbitration issues presented in this case. The conflict cannot be reconciled without further review by this Honorable Court.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT.

No. 87-3375.

STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING,

Plaintiff-Appellant,

v.

M/V WESERMUNDE, Her engines, tackle, apparel, furnishings, etc.; in rem: Marquis Compania Naviera, S.A.; The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited; Pateras Brothers, Ltd.; Pateras Investments, S.A.; and Kittiwake Compania Naviera, S.A., in personam

Defendants-Appellees.

March 11, 1988.

Shipper appealed from order of United States District Court for the Middle District of Florida, No. 83-541-CIV-T-15, William J. Castagna, J., which dismissed its action against vessel and others for loss of cargo. The Court of Appeals, Owens, Chief District Judge, sitting by designation, held that: (1) provision requiring arbitration in England for loss of cargo shipped by United States shipper from the United States to Jordan violated COGSA; (2) it was error to dismiss for failure to prosecute where shipper had indicated that it would take its chances on winning reversal on appeal of the arbitration order rather than proceeding to arbitrate; and (3) arbitration order should have been certified for appeal.

Reversed, vacated and remanded.

David G. Hanlon, Shackleford, Farrior, Stallings & Evans, Tampa, Fla., for plaintiff-appellant.

Allen Von Spiegelfeld, Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, Fla., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before VANCE and HATCHETT, Circuit Judges, and OWENS,* Chief District Judge.

OWENS, Chief District Judge:

In this latest appeal from a decision of the United States District Court for the Middle District of Florida, appellant, State Establishment For Agricultural Product Trading (hereinafter State Establishment), seeks to have this court reverse the decision of the district court that: (1) required it to arbitrate its dispute in London, England, and (2) stayed any further proceedings in the district court until that arbitration proceeding had been completed. State Establishment refused to comply with this order compelling arbitration, and as a result of its noncompliance, State Establishment now finds itself in the posture of having its case dismissed with prejudice for want of prosecution. The issue before this court is whether the district court erred in ordering arbitration in this case, and, if so, whether it was an abuse of discretion to dismiss State Establishment's case with prejudice for failure to comply with that arbitration order. Because we find that the district court did err in requiring arbitration, and further, that there was available to the district court a less severe sanction other than outright dismissal with prejudice of State Es-

* Honorable Wilbur D. Owens, Jr., Chief U.S. District Judge for the Middle District of Georgia, sitting by designation.

tablishment's claims, the court VACATES the district court's order dismissing State Establishment's action and REMANDS the case for further proceedings consistent with this opinion.

Background

On May 4, 1983, State Establishment instituted a multi-million dollar suit for damages arising out of the loss of a cargo of 82,073 cases of fresh eggs laden on board the M.V. Wesermunde in Tampa, Florida, for delivery to Aqaba, Jordan. Apparently before the eggs could be off-loaded in Aqaba, Jordan, they were destroyed by fire. Named in State Establishment's complaint as defendants were the M.V. Wesermunde, the vessel of foreign registry that carried the cargo of eggs to Aqaba, Jordan; Marquis Compania Naviera, S.A., and Kittiwake Compania Naviera, S.A., corporations engaged in the common carriage of cargo by sea; Pateras Brothers, Ltd. and Pateras Investment, S.A., corporations engaged in the management of ocean-going vessels including the M.V. Wesermunde; and the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd. (U.K. Club), the liability underwriter for these defendants. State Establishment, owner of the cargo of eggs, is an agency of the government of Iraq incorporated and organized under the laws of that country.

U.K. Club, liability underwriter of the M.V. Wesermunde and for all of the named defendants, initially filed a motion to dismiss the complaint against it on the ground that State Establishment did not have a direct action under Florida law against a marine insurer. The district court granted U.K. Club's motion on December 20, 1983, and State Establishment took an appeal from this decision. We found, however, that our ruling in *Steelmet Inc. v. Caribe Towing Corp.*, 779 F.2d 1485 (11th Cir.1986), was contrary to the district court's position and controlling under the facts of the case. We, therefore, reversed the decision

of the district court and reinstated U.K. Club as a party to State Establishment's action. *See State Establishment For Agricultural Product Trading v. M.V. Wesermunde,* 785 F.2d 1035 (11th Cir.1986).

While this "direct action" issue concerning U.K. Club was still on appeal, the remaining defendants moved to have the underlying dispute between them and State Establishment referred to arbitration in London, England. These defendant supported their demand for arbitration by showing that on December 18, 1981, defendant Marquis Compania Naviera, S.A., the owner of the M.V. Wesermunde, entered into a charter party agreement with Murray Clayton Limited as charterer. A "charter party" is a specialized type of maritime contract for the hire of a vessel. The person who obtains the use and service of the ship is called the charterer, and the person hiring out the vessel is usually the shipowner. *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law,* Section 10-1 at p. 381 (1987). Included in paragraph 34 of this charter party agreement was the language that "[a]ny dispute arising under this charter party to be settled by arbitration in London (not lawyers) according to the Arbitration Act." Defendants further showed that the bills of lading under which State Establishment was to have its cargo of eggs shipped contained the following language:

> All the terms, conditions, liberties, and exceptions of the Charter-Party are herewith incorporated. AS PER CHARTER PARTY DATED DECEMBER 18th, 1981.

Defendants additionally moved to stay the action before the district court during the pendency of any court ordered arbitration proceeding, pursuant to 9 U.S.C. §§ 2 and 3 (1970). In response to that motion, State Establishment argued that it was not bound by the terms of the charter party since it was not a signatory to the charter party, nor did the dispute arise from the charter party agree-

ment. It also argued that there was never any contractual agreement between the parties to arbitrate their disputes, and without such an agreement, there was no basis to order arbitration. *See AT & T Technologies v. Communications Workers,* 475 U.S. 643, 647, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648, 655 (1986). After reviewing the documents submitted by defendants in support of their motion, however, the district court ruled that the bill of lading given to State Establishment effectively incorporated by reference the arbitration clause found in the charter party, ordered arbitration, and stayed the proceedings before the district court.

Eager to have this ruling reversed, State Establishment filed a second appeal to this court. We found, however, in *State Establishment for Agricultural Product Trading v. M.V. Wesermunde,* 770 F.2d 987, 989 (11th Cir.1985), that the appeal was premature due to an antiquated, but still viable, admiralty law doctrine. This doctrine, as stated in *Schoenamsgruber v. Hamburg American Line,* 294 U.S. 454, 55 S.Ct. 475, 79 L.Ed. 989 (1935), provides that while proceeding in admiralty, an order compelling arbitration and staying the action pending arbitration pursuant to 9 U.S.C. §§ 1-14 is:

(1) not a final order under 28 U.S.C. § 225 (now § 1291);

(2) not an injunction under 28 U.S.C. § 227 (now § 1292(a)(1)); and,

(3) not an appealable interlocutory decree under the present § 1292(a)(3).

770 F.2d at 989. We, therefore, concluded that the court lacked jurisdiction to hear the appeal, and consequently dismissed it.

Frustrated that the district court's arbitration decision could not be appealed as a matter of right, State Establishment next proceeded to request the district court to

reconsider its stay order, and, if it should refuse to do so, moved in the alternative to have the district court certify the question for immediate appeal, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Both of these motions were denied.

Following the denial of these motions, State Establishment remained unable or unwilling to go to arbitration in London, England. All defendants except U.K. Club, which had just been reinstated as a party, then presented the district court with a motion to dismiss State Establishment's case. These defendants asserted that State Establishment's willful refusal to comply with the district court's order compelling arbitration constituted sufficient grounds to dismiss the complaint. The district court ordered State Establishment to show cause why its claims should not be dismissed for want of prosecution, and in response to this show cause order, State Establishment argued that the arbitration order was erroneous, and that if the district court would not reconsider its earlier decision, then it prayed for an order of dismissal with prejudice so that the arbitration issue could finally be resolved by the Court of Appeals. At oral argument, State Establishment further explained its refusal to arbitrate by stating that when the district court refused to reconsider its arbitration order, and also refused to certify the question for an immediate appeal, State Establishment was placed in, what it considered to be, a "Catch 22" position—State Establishment was now required to expend substantial time, effort, and funds to comply with a likely erroneous arbitration order, yet because of the *Schoenamsgruber* doctrine, it was necessary to complete the arbitration process before the validity of the arbitration proceeding could be tested on appeal. Faced with this dilemma, State Establishment believed that it was better to forego any damages it might potentially be able to recover from the arbitration process for the chance that the district court erred in ordering arbitration, that we would reverse this decision, and that

ultimately, we would allow its claims to be tried before the district court. The inherent risk in taking such a position was, of course, that if the district court was correct in ordering arbitration, the dismissal with prejudice for failure to comply with that order would be affirmed by this court. Fortunately for State Establishment, however, under the facts presented to the district court, we are troubled with the lower court's order requiring the parties to arbitrate their dispute in London, England.

Propriety of Ordering Arbitration

In making its decision that the bill of lading given to State Establishment effectively incorporated by reference the arbitration clause found in the charter party, this court believes that the district court failed to give sufficient weight to other language in the bills of lading that incorporated by reference the provisions of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315, (1975), and the body of case law interpreting that Act. Conforming to the typical bill of lading utilized by most carriers engaged in transporting cargo by sea, the provisions of COGSA were incorporated by reference into the bills of lading given to State Establishment.[1] The body of

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[1] The bills of lading contained the following language:

This Bill of Lading shall have effect subject to the provisions of any legislation relating to the carriage of goods by sea which incorporates the rules relating to Bills of Lading contained in the international convention, dated Brussels 25th August, 1924 and which is compulsorily applicable to the contract of carriage herein contained. Such legislation shall be deemed to be incorporated herein, but nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities thereunder. If any term of this Bill of Lading be repugnant to any extent to any legislation by this clause incorporated, such terms shall be void to that extent but no further. Nothing in this Bill of Lading shall operate to limit or deprive the Carrier of any statutory protection or exemption from, or limitation of, liability.

case law applying COGSA's provisions are thus made applicable to the bill of lading contract. COGSA does not apply, however, *ex proprio vigore.* At oral argument State Establishment represented to the court that it believed that its cargo of eggs constituted the entire cargo aboard the M.V. Wesermunde during its fateful voyage from Tampa, Florida, to Aqaba, Jordan. Under these facts, a private contract of carriage was created and COGSA's protections would not apply on their own force. Defendants need not have, therefore, complied with COGSA's provisions. *See* Schoenbaum, *Admiralty and Maritime Law,* section 9-11, at 307-08. Nevertheless, by specifically adopting COGSA's provisions into the bills of lading, COGSA applies to these parties as a matter of contract. COGSA's protections must be afforded to State Establishment, then, unless there was an express agreement by the parties that a contrary result was intended.

Before the court need address the issue of whether there was an express agreement to waive certain rights under COGSA, however, we must first determine whether any of COGSA's provisions would bar the enforcement of the foreign arbitration clause found in the charter party. In order to answer this question the court finds enlightening the legislative history of COGSA. COGSA represents the American enactment of the Hague Rules, developed at a series of international maritime conferences in the 1920's. It was promulgated as part of an international effort to achieve uniformity and simplification of bills of lading used in international trade. *See Robert C. Herd & Co. v. Krawill Machinery Corp.,* 359 U.S. 297, 301, 79 S.Ct. 766, 769, 3 L.Ed.2d 820, 823 (1959). COGSA was also intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers, and the liabilities of underwriters who insure waterborne cargo. By strictly circumscribing the ability of carriers to avoid liability on cargoes in their care, COGSA also greatly enhances the negotiability of bills of lading.

See Wirth Ltd. v. S.S. Acadia Forest, 537 F.2d 1272, 1276-79 (5th Cir.1976); and *Portland Fish Co. v. States Steamship Co.,* 510 F.2d 628, 631-33 (9th Cir.1974); *see generally,* Schoenbaum, *Admiralty and Maritime Law,* section 9-13, at 314-15.

Of most relevance to the issue at bar is the statute's power to void overreaching clauses inserted by carriers in their bills of lading that unreasonably limit the carrier's liability or obstructs the freight claimant's ability to secure redress. *See Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer,* 422 F.2d 7, 11-12 (2d Cir.1969), *cert. denied,* 397 U.S. 964, 90 S.Ct. 998, 25 L.Ed.2d 255 (1970). In providing this latter protection, courts have found contractual language requiring a consignee to litigate claims against the carrier in a foreign forum under foreign law to be ineffective because such provisions, as a practical matter, tend to lessen the liability of the carrier, particularly where the claim is small. *See Indussa Corp. v. S.S. Ranborg,* 377 F.2d 200, 203-04 (2d Cir.1967); and G. Gilmore & C. Black, *The Law of Admiralty,* §§ 3-25 at 145 n. 23 (2d ed. 1975) (such a clause puts a high hurdle in the way of enforcing liability and thus is an effective means for carriers to secure settlements lower than if cargo could sue in a convenient forum). While we do not believe that arbitration in and of itself is *per se* violative of COGSA's provisions, especially in light of Congress' encouragement of arbitration by its enactment of the Arbitration Act, 9 U.S.C. §§ 1-14 (1970)[2] the court does believe that a provision requiring arbitration in a *foreign* country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general

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[2] *See Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 217-221, 105 S.Ct. 1238, 1240-43, 84 L.Ed. 158 (1985) (strong federal policy in favor of enforcing arbitration agreements); and *State Establishment For Agricultural Product Trading,* 770 F.2d at 991 n. 5.

purpose of not allowing carriers to lessen their risk of liability.

The facts presented to the district court on this issue were that the only party related to the English forum was the charterer, Murray Clayton Ltd., who was not a named defendant in State Establishment's action. The bills of lading were entered into in Tampa, Florida. The final negotiation of the bills of lading took place in Tampa, Florida. The bills of lading were to be performed in Tampa, Florida, Aqaba, Jordan, and all ports in between. The cargo was loaded in Tampa, Florida, and finally, defendants' domicile, residence, nationality, place of incorporation, and place of business are located in Panama, the Bahamas, and Greece; whereas State Establishment's domicile is in Iraq. These facts lead this court to believe that enforcement of the arbitration clause found in the charter party would have the effect in this case of lessening the liability of the carrier. Accordingly, if COGSA applied *ex proprio vigore,* the provision requiring arbitration in London, England, would have been void and utterly without effect. *See* 46 U.S.C. § 1303(8).

Even if the provision requiring arbitration in London, England did not *per se* conflict with COGSA's requirement that no provisions may lessen the shipowner's liability below that of the statutory minimum, the court considers the language requiring foreign arbitration in this case to, at least, arguably conflict with COGSA's implied policy that an American forum will be made available to a consignee when a bill of lading is issued subject to the terms of that Act. We have held that where such an arguable conflict exists, at minimum, the consignee must be given *actual* notice of the conflicting provision before entering into the contract in order to have that provision enforced. In the first of our decisions on this subject, we held in *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497 (11th Cir.1983), that the applicable statute of limitations in the case could not be modified by a provision

found in a long form bill of lading, where that provision was incorporated by reference into the short form bill of lading, the language was never specifically brought to the consignee's attention, the consignee did not have actual knowledge of the provision in the long from bill of lading, and the provision arguably conflicted with the absence of a specific limitations period under the Harter Act. *Id.* at 500. This decision was reaffirmed in *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir.1986), *cert. denied*, ___U.S. ___, 107 S.Ct. 1577, 94 L.Ed.2d 768 (1987), wherein we found that while not prepared to strike down all tariff provisions of which a shipper has no actual notice, in order to insure a reasonable result and to prevent injustice, it is proper to require that a shipper be given actual notice of a provision that arguably conflicts with the protections afforded him under certain federal Acts, such as COGSA and the Harter Act, where those Acts are traditionally incorporated by reference into all bills of lading. *Id.* at 703-04. We, thus, hold in this case that absent actual notice to State Establishment of the foreign arbitration clause found in the charter party, COGSA and the case law interpreting that act would have barrred defendants from invoking the language requiring arbitration.

It is this court's conclusion, then, that COGSA would either bar *per se* the enforcement of the instant arbitration clause or the provision would be ineffective unless actual notice of it was given to State Establishment when it signed the bills of lading. By adopting COGSA contractually into the bills of lading, these protections should be afforded State Establishment *unless* there was an express agreement by the parties that a contrary result was intended. In reviewing the evidence before the district court, we are simply unpersuaded that the incorporation by reference language in the bills of lading constitutes an express agreement by these parties that State Establishment would give up its right under COGSA to demand an Amer-

ican forum for any potential claims that might later arise in favor of an arbitration proceeding to be held in a London, England forum. There is no evidence that the terms of the bills of lading in this case were agreed to through hard bargaining; rather they appear to be the form clauses of an adhesion contract. *See Union Insurance Society of Canton, Ltd. v. S.S. Elikon,* 642 F.2d 721, 724 (4th Cir.1981); and 6A A. Corbin, *Contracts* § 1376, at 21-22 n. 17 (1962). No reference is made to arbitration in the bills of lading. Nothing alerts State Establishment's attention to the possibility that the reference to the charter party may be a "booby trap," and, of course, there is no evidence that State Establishment was provided with a copy of the charter party. *See Siderius, Inc. v. M.V. Ida Prima,* 613 F.Supp. 916 (D.C.N.Y. 1985). State Establishment was, however, provided with actual notice on the face of the bills of lading that COGSA's provisions would be made applicable to the contract of carriage. These facts lead us to conclude that: (1) State Establishment was not given actual notice of the arbitration provision in the charter party; (2) the parties never expressly agreed to have any disputes arising out of the bills of lading litigated first in a foreign arbitration proceeding; and (3) that COGSA's protections were expressly agreed to by the parties in the bills of lading. The district court's order that required State Establishment to first arbitrate its claims against the named defendants in London, England, therefore, was erroneous. Because the district court erred in this regard, we must now consider whether the district court also erred when it dismissed State Establishment's case with prejudice for want of prosecution.

Abuse of Discretion

The decision to dismiss for want of prosecution lies within the trial court's discretion and can be reversed only for an abuse of discretion. *See McKelvey v. AT & T Technologies, Inc.,* 789 F.2d 1518, 1520 (11th Cir.1986); and

Martin-Trigona v. Morris, 627 F.2d 680, 682 (5th Cir.1980). The severe sanction of dismissal with prejudice, however, can be imposed "only in the face of a clear record of delay or contumacious conduct by the plaintiff." *Id.* at 682. Furthermore, our decisions make clear that such a dismissal is a sanction of last resort, applicable only in extreme circumstances, and generally proper only where less drastic sanctions are unavailable. See *McKelvey,* 789 F.2d at 1520; and *Searock v. Stripling,* 736 F.2d 650, 653 (11th Cir.1984). Finally, we must find that the sanction was supported by a record of willful delay, as opposed to a mere showing of negligence on the part of the party being sanctioned. *McKelvey,* 789 F.2d at 1520.

In this case, it is clear that State Establishment's refusal to arbitrate its dispute in London, England, resulted not from any negligence on its part, but rather, from a conscious decision to forego any damages it might otherwise be able to recover in that arbitration proceeding for the chance that the district court erred in ordering arbitration, and that it could win a reversal of that order. Having found that State Establishment was correct in arguing that it should not have been required to submit its claims to foreign arbitration, this court must decide whether a less drastic sanction was available to the district court judge after State Establishment informed the court that it absolutely refused to go forth with the foreign arbitration proceeding. We believe that under the facts presented in this case, the district judge should have certified the question under Rule 54(b) of the Federal Rules of Civil Procedure, but only after State Establishment stipulated on the record that it was prepared to dismiss with prejudice all claims that it had with the named defendants should the district court's arbitration order be affirmed by this court. Such an order would allow the district court to effectively handle the manner in which a case proceeds before it, while at the same time, by imposing a penalty

upon the party seeking to circumvent the "finality" rule,[3] a party that finds its claim seriously diminished or even potentially not worth pursuing following an adverse ruling by the trial court, may have an avenue of relief from that adverse ruling. We, therefore, find that the district court abused its discretion when it did not offer to conditionally certify the arbitration question to this court.

Conclusion

In conclusion, we have found that the district court erred by not giving sufficient weight to the language in the bills of lading that incorporated by reference the provisions of COGSA. There being no evidence that State Establishment had actual notice of the arbitration clause found in the charter party nor any evidence that the parties expressly agreed to waive any of the protections provided for by COGSA, it should not have been required to arbitrate its claims against these defendants in London, England. Furthermore, we have also found that under the facts of this case, the district court abused its discretion in dismissing State Establishment's complaint with prejudice when it did not offer to conditionally certify the arbitration question to this court prior to dismissing the action. We, therefore, REVERSE the decision of the district court requiring arbitration and VACATE the order that dismissed State Establishment's action with prejudice and REMAND the case for further proceedings in accordance with the opinion of this court.

REVERSED, VACATED and REMANDED.

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[3] In this case an unsuccessful appeal would have meant that the merits of State Establishment's claim would never have been reached.

APPENDIX B

U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 85-706
SECTION "C" (5)

AIU INSURANCE COMPANY and
NISSHO IWAI CORPORATION

versus

M/V STAMY, her Engine, Tackles apparel,
Etc., *in rem*,
COSMIAN COMPANIA NAVIERA, S.A.
and PHOENIX MARITIME AGENCY, LTD.,
in personam

Minute Entry
June 24, 1988
Collins, J.

FILED JUN 28, 1988
Loretta G. Whyte
Clerk

Plaintiffs, AIU Insurance Company and Nissho Iwai Corporation, have moved to reopen the above capitoned proceedings, which were stayed by this Court pending arbitration in London, England.

Relying on the recent Eleventh Circuit decision of *State Est. for Agr. Prod. Trading v. M/V Wessermunde*, 838 F.2d 1576 (11th Cir.1988), and defendants alleged refusal to go forward with arbitration, plaintiffs contend that these "changed circumstances" justify restoring this action to the trial docket.

Unsubstantiated factual allegations that defendants have refused to go forward with arbitration will not support this Court's intervention in the matter. In *Wessermunde*, the eleventh circuit held that, a foreign arbitration clause incorporated in a Bill of Lading which is also subject to the terms of the Carraige of Goods Overseas Act (COGSA) conflicts with an implied policy of COGSA to make available an American forum to consignees. That Court concluded that COGSA bars the enforcement of a foreign arbitration clause where the forum has no connection with either the performance of the Bill of Lading contract or the making of the Bill of Lading contract unless there is an express agreement between the parties to do so. Although plaintiffs rely on *Wessermunde* as authority for reopening this case, that decision is not binding on this Court. This Court finds more persuasive the reasoning set forth in *Tai-Ping Insurance Company v. the M/V Warschau*, 731 F.2d 1141 (5th Cir.1984). That circuit court held that the district court abused its discretion by staying arbitration being held pursuant to an arbitration clause validly incorporated in the charter party agreement which governed cargo disputes. Further persuasive authority is found in a case decided in this district. In *Associated Metals & Minerals Corp. v. M/V Venture*, 554 F.Supp. 281 (E.D.La. 1983), Judge Schwartz held that a holder in due course of a bill of lading was bound by the arbitration agreement which was contained in the charter party, and incorporated by reference into the bill of lading. Both of these decisions support this Court's initial decision to stay proceedings in this case pending arbitration. The arbitration clause incorporated into the bill of lading is a valid, enforceable agreement to arbitrate disputes arising under the contract carriage and is binding upon holders in due course.

Finally, the test set forth by the United States Supreme Court for determining whether claims based on statutory rights should be arbitrated does not support plaintiff's po-

sition that the arbitration caluse here at issue is in conflict with the provisions of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315 (1975). In the case of *Shearson/American Exp., Inc. v. McMahon*, 107 S.Ct. 2332 (1978) the Supreme Court held that ". . . the Arbitration Act's mandate may be overriden by a contrary Congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson*, 107 S.Ct. at 2337. Based on the "federal policy favoring arbitration", *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983), and the test set out by the Supreme Court in *Shearson*, this Court declines to follow the reasoning set forth in the *Wessermunde*.

Further, this Court finds this situation distinguishable from that in the *Wessermunde*. The agreement in that case was specifically determined to be a form clause of an adhesion contract. That court found that "[n]o reference is made to arbitration in the bills of lading. Nothing alerts State Establishment's attention to the possibility that the reference to the charter party may be a "booby trap," and, of course, there is no evidence that State Establishment was provided with a copy of the charter party. (Citations omitted)." Here, plaintiffs have made no allegations that a copy of the charter party was not provided, there is no evidence that this was a contract of adhesion, and the arbitration clause is clearly referred to on the face of the bill of lading. Accordingly, plaintiff's motion to reopen proceedings is hereby DENIED.

ROBERT F. COLLINS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-541-Civ-T-15

STATE ESTABLISHMENT FOR
AGRICULTURE PRODUCT TRADING,
Plaintiff,

v.

M/V WESERMUNDE, etc., et al.,
Defendants,

ORDER

On this day came on to be considered the plaintiff's response to the Court's order of April 21, 1987, to show cause. The Court having considered plaintiff's response and being otherwise advised in the premises, it is thereupon

ORDERED:

That the complaint by State Establishment for Agricultural Product Trading against M/V Wesermunde, Marquis Compania Naviera, S.A., United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited, et al., is dismissed with prejudice on the ground that State Establishment for Agricultural Product Trading has failed to show cause why this case should not be dismissed for failure to prosecute it.

DONE AND ORDERED at Tampa, Florida this 4th day of May, 1987.

/s/ William J. Castagna

WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to
Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-541-Civ-T-15

STATE ESTABLISHMENT FOR
AGRICULTURAL PRODUCT TRADING,
Plaintiff,

vs.

M/V WESERMUNDE, etc., et al.,
Defendants.

ORDER

The Court has considered the plaintiff's amended motion to lift stay and the defendants' memorandum in opposition to that motion. On August 21, 1984 the Court stayed these proceedings pending the outcome of arbitration in London. The plaintiff then sought interlocutory appeal of that order and that appeal was dismissed by the Eleventh Circuit on September 10, 1985.

It now appears that the plaintiff has done nothing since the appeal was dismissed to facilitate arbitration of this dispute but has merely endeavored to relitigate the arbitration issue using English law. This Court has applied American law and found the arbitration provisions to be valid and the plaintiff offers no good reason for applying English substantive law to block the arbitration in this case. It may well be that an English court would not have enforced the arbitration provision as to these parties but it does not follow that arbitration in London is prohibited.

Finally, the Court has considered "plaintiff's motion for leave to file response to defendants' memorandum in opposition to plaintiff's amended motion to lift stay." That motion is several pages long and is more than a motion for leave—it incorporates the response. The response essentially is not a response to the defendants' memorandum in opposition. Rather, it raises a new argument that arbitration should not proceed because defendant U.K. Club is now back in the case and that U.K. Club cannot be compelled to arbitrate. The plaintiff also reargues the underlying issue of whether arbitration should have been compelled by this Court. The plaintiff is using the addition of a formerly dismissed defendant as an opportunity for arguing that the arbitration ordered more than one and one-half years ago *should not* proceed, but none of its arguments show any persuasive legal basis for a conclusion that such arbitration *cannot* proceed.

Having considered the foregoing, it is

ORDERED:

1. That the plaintiff's amended motion to lift stay is DENIED.

2. That on or about thirty days from the date of this Order the plaintiff shall report as to the status of the arbitration proceedings.

3. A STATUS CONFERENCE shall be held in this case on March 26, 1986 at 2 p.m. before the undersigned at 611 North Florida Avenue, Tampa, Florida. Counsel for *all parties* shall attend.

4. That plaintiff's motion for leave to file response . . . is Denied.

DONE AND ORDERED at Tampa, Florida this 28th day of February, 1986.

/s/ William J. Castagna
WILLIAM J. CASTAGNA

UNITED STATES DISTRICT JUDGE

Copies to
Counsel of Record

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 83-541-Civ-T-15

STATE ESTABLISHMENT FOR
AGRICULTURAL PRODUCT TRADING,
Plaintiff,

vs.

M/V WESERMUNDE, etc., et al.,
Defendants.

ORDER

The Court has for consideration Defendants' Motion for Stay Pending Arbitration.

Defendant Marquis Compania Naviera, S.A., the owner of the M.V. Wesermunde, entered into a charter party which stated in paragraph 34, "Any dispute arising under this charter party to be settled by arbitration in London (not lawyers) according to the Arbitration Act." Plaintiff in this action is the owner of a cargo of fresh eggs carried aboard the M.V. Wesermunde and of the covering bills of lading. The bill of lading specifically and explicitly incorporated the terms of the charter party by the following language: "All the terms, conditions, liberties, and exceptions of the Charter-Party are herewith incorporated as per Charter Party dated December 18, 1981." Plaintiff opposes submission of this case to arbitration on the grounds that it was not a signatory to the charter party and that this dispute does not arise out of the charter party.

Plaintiff's argument is without merit. This case is similar to *Son Shipping Co. v. DeFosse & Tanghe,* 199 F.2d 687 (2d Cir.1952). There the Court stated:

> These order bills of lading specifically referred to the charter party and, in language so plain that its meaning is unmistakable, incorporated in the bills all the terms 'whatsoever' of the charter party. . . . Where terms of the charter party are, as here, expressly incorporated into the bills of lading they are a part of the contract of carriage and are binding upon those making claim for damages for breach of the contract just as they would be if the dispute were between the charterer and the shipowner. 199 F.2d at 688.

This dispute is referable to arbitration under 9 U.S.C. § 2, and it will be stayed in accordance with 9 U.S.C. § 3. Therefore, it is

ORDERED:

1. Defendants' Motion to Stay is granted.

2. This cause is STAYED pending arbitration.

3. The Plaintiff shall on November 21, 1984 and each 90 days thereafter, file in this cause a status report setting forth the status of the arbitration proceeding.

DONE AND ORDERED at Tampa, Florida this 21st day of August, 1984.

/s/ William J. Castagna
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87-3375

STATE ESTABLISHMENT FOR
AGRICULTURAL PRODUCT TRADING,
Plaintiff-Appellant,

versus

M/V WESERMUNDE, her engines, tackle,
apparel, furnishings, etc., *in rem*;
MARQUIS COMPANIA NAVIERA, S.A.,
THE UNITED KINGDOM MUTUAL STEAMSHIP
ASSURANCE ASSOCIATION (BERMUDA) LIMITED,
PATERAS BROTHERS, LTD., PATERAS INVESTMENTS,
S.A.,
KITTIWAKE COMPANIA NAVIERA, S.A., *in personam,*
Defendants-Appellees.

On Appeal from the United States District court for the Middle District of Florida

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Filed April 18, 1988

ON PETITION FOR REHEARING

BEFORE: VANCE and HATCHETT, Circuit Judges, and OWENS*, Chief District Judge.

PER CURIAM:

The petition for rehearing filed by appellees, Marquis Compania Naviera, S.A., et al., is Denied.

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* Honorable Wilbur D. Owens, Jr., Chief U. S. District Judge for the Middle District of Georgia, sitting by designation.

ENTERED FOR THE COURT:
/s/ Robert S. Vance
United States Circuit Judge

APPENDIX G

ARBITRATION ACT, 9 U.S.C. § 1-4

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. July 30, 1947, c. 392, 61 Stat. 670.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the mak-

ing of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trail of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.
July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.

CARRIAGE OF GOODS BY SEA ACT 46 U.S.C. § 1303 (1975)

§ 1303. Responsibilities and liabilities of carrier and ship

Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Contents of bill

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided,* That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Bill as prima facie evidence

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein de-

scribed in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49.

Guaranty of statements

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Notice of loss or damage; limitation of actions

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or

the date when the goods should have been delivered: *Provided,* That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"Shipped" bill of lading

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading; *Provided,* That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

Limitation of liability for negligence

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from lability.

Apr. 16, 1986, c. 229, §3, 49 Stat. 1208.

and the Documentary Committee of The Chamber of Shipping of the United Kingdom.

Issued to come into force for fixtures on and after 15th Sept. 1922

The Documentary Council of The Baltic and White Sea Conference.

(The Baltic and International Maritime Conference)

J 11216.

UNIFORM GENERAL CHARTER

AS REVISED 1922

(only to be used for trades for which no approved form is in force)

CHAS. C[illegible] & CO.

Code Name: Gencon.

ERNST RUSS HAMBURG "CHARTERRUSS" "ER"

London, 18th December, 1981

Owners. 1. IT IS THIS DAY MUTUALLY AGREED between Messrs. MARQUIS COMPANIA NAVIERA S.A., PANAMA

Owners of the steamer motor-vessel: "VESERMÖNDE"

of 2133 / 1545 tons gross/net Register and carrying about 2,700 tons of deadweight cargo,

Present now trading

and expected ready to load under this Charter about 15th January, 1982

Charterers. and Messrs. MURRAY CLAYTON LIMITED

of LEATHERHEAD, SURREY, U.K. as Charterers

Where to load. That the said vessel shall proceed to TAMPA, 1 good and safe berth

~~as near alway thereto as she may safely get~~ and lie always afloat, and there ~~being~~ load full and complete cargo ~~(if shipment of dead cargo agreed same to be at Charterers risk)~~ of EGGS in cartons (about 3,1 cubic foot per carton).

Eggs to be stowed maximum 9 tiers high.

VESSEL TO BE RESPONSIBLE FOR THE NUMBER OF CARTONS LOADED.

(Charterers to provide all mats and/or wood for dunnage and any separations required, the Owners allowing the use of any dunnage wood on board if required; which the Charterers bind themselves to ship, and being so loaded the vessel shall proceed to

Cargo

Discharging. 1 good and safe berth AQABA, Charterers' option 1 good and safe berth MERSIN

but if Gulf of Aqaba and/or Suez canal should be closed, then vessel to discharge at Marsaia or such other destination subject to mutual agreement/negotiation.

as ordered on signing Bills of Lading ~~or so near thereto as she may safely get~~ and be always afloat and there deliver the cargo on being paid freight ~~on delivered quantity~~ as

Rate of Freight. follows: If AQABA: US$ 400,000,-- (Say: fourhundred thousand U.S. Dollars).

If MERSIN: US$ 335,000,-- (Say: threehundredthirtyfive thousand U.S. Dollars).

LUMPSUM F.I.O.S., fully prepaid less commission within 5 workingdays of signing clean Bills of Lading, discountless and non-returnable, ship and/or cargo lost or not lost. Freight is payable via Evans, Dunlop & Co., London for direct telegraphic transfer to J. Henry Schroder Bank & Trust Co., 1 State Str. New York, NY 10015, Acct. Colonial Bank Nbr. 27914, Ref. Marquis Coop. Navieras.

Owners' responsibility Clause. 2. Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods (unless stowage performed by shippers or their stevedores or servants) or by personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their Manager.

And the Owners are responsible for no loss or damage or delay arising from any other cause whatsoever, even from the neglect or default of the Captain or crew or some other person employed by the Owners on board or ashore for whose acts they would, but for this clause, be responsible, or from unseaworthiness of the vessel on loading or commencement of the voyage or at any time whatsoever.

Damage caused by contact with or leakage, smell or evaporation from other goods or by the inflammable or explosive nature or insufficient package of other goods not to be considered as caused by improper or negligent stowage, even if in fact so caused.

Deviation Clause. 3. The vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property.

Payment of Freight. 4. The freight to be paid ~~as per clause 1 on delivery of the cargo~~ at mean rate of exchange ruling on day or days of payment, the receivers of the cargo being bound to pay freight on account during delivery, if required by Captain or Owners.

As per Clause 1

Cash for vessel's ordinary disbursements at port of loading to be advanced by Charterers if required at highest current rate of exchange, subject to two per cent. to cover insurance and other expenses.

Loading. 5. Cargo to be brought alongside in such a manner as to enable vessel to take the goods with her own tackle and to load the full cargo in ~~working days~~. Charterers to procure and pay the necessary men on shore or on board the lighters to do the work there, vessel only receiving the cargo on board.

If the loading takes place by elevator cargo to be put free in vessel's holds, Owners only paying trimming expenses.

~~Any pieces and/or packages of cargo over two tons weight, shall be loaded, stowed and discharged by Charterers at their risk and expense.~~

See also Clause 17 Time to commence at 2 p.m. if notice of readiness to load is given before noon and at 8 a.m. next working day if notice given during office hours after noon.

unless commenced earlier, in which case time actually used to count as laytime. The notice to be given to the shippers, Messrs and agents as per Cl. 27

Laytime. Time lost in waiting for berth to count as loading time.

Discharging. 6. ~~Cargo to be received by Merchants at ships rail and expense alongside the vessel and beyond the reach of her tackle and to be discharged in~~ ~~working working days.~~ Time to commence at 2 p.m. if notice of readiness to discharge is given before noon, and at 8 a.m. next working day if notice given during office hours after noon.

See also Clause 17

Laytime. Time lost in waiting for berth to count as discharging time.

Demurrage. 7. ~~Two running days on~~ Demurrage at the rate of US$ 6,000,-- per day or pro rata for any part of a day, payable ~~day by day to be allowed Merchants~~ ~~consignee~~ at ports of loading and discharging.

Lien Clause. 8. Owners shall have a lien on the cargo for freight, dead freight, demurrage and ~~damages for detention~~. Charterers shall remain responsible for dead freight and demurrage ~~(including damages for detention)~~ incurred at port of loading. Charterers shall also remain responsible for freight and demurrage ~~(including damages for detention)~~ incurred at port of discharge, ~~but only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo~~.

Bills of Lading. 9. The Captain to sign Bills of Lading at such rate of freight as presented without prejudice to this Charter-party, but so that the freight by Bills of Lading

23. Overtime to be for account of the party ordering same, but overtime of Officers and crew always to be for Owners' account. If overtime ordered by portauthorities, cost of same to be for Charterers' account, except for Officers and crew which remains for Owners' account.

24. Vessel's holds to be clean and dry, free from smell and suitable for a cargo of eggs in cartons and or other general merchandise, in conformity with normal sanitary hygienic standards before Notice of Readiness to load can be given.

25. Owners guarantee to keep during the transport a temperature in the egg cargo holds of +4/+6 degrees Celcius, and for other general merchandise as appropriate.

34a

26. Owners/Master to provide Charterers with an extract of vessel's logbook stating temperatures in cargoholds taken every 4 hours.

27. Owners/Master to wireless 7/5/3/2/1 days ETA to loading port Agents and to Harborside Refrigerated Services. Tampa. Telex: 052705. Phone: (813) 2473974.

Notices of Readiness to load also to be given to:

United Trading Corp., U.S.A.
Suite 500, 1745, Jefferson Davis Highway
Arlington Va, 22202, U.S.A.
Attn: Mr. K. Karjawally, Phone: 703 521 0333, Telex: 892401.

28. Owners/Master to wireless 10/8/6/5/4/3/2/1 days ETA discharging port to agents at discharging port also to "MURICLATON" LEATHERHEAD, ENGLAND. Telex No.: 893115.

29. Owners to allow Visser & Visser Chartering B.V. of Rotterdam to issue as their agents a letter confirming the vessel is not blacklisted by the Arabian Boycott Office and that vessel during the voyage will not enter any Isrealian waters.

30. Any taxes and/or dues on cargo and/or freight to be for Charterers' account. Any dues and/or taxes on vessel to be for Owners' account.

31. If Owners foresee that vessel cannot reach her cancelling date, Owners immediately to advise Charterers hereof, and Charterers shall within 24 hours (Sundays and Holidays excluded) after receipt of such notice, advise whether they cancel this Charter Party or not.

32. Demurrage, if any, occurred in loading- and discharging port is guaranteed and payable by Charterers.

33. Owners to pay Charterers despatch-money at half demurrage rate for all workingtime saved.

34. Any dispute arising under this Charter Party to be settled by arbitration in London (not lawyers) according to the Arbitration Act.

BILL OF LADING

UNIFORM BILL OF LADING 1946

approved by

The Documentary Council of The Baltic and International Maritime Conference.

To be used with Charter-Parties.

Code Name: Congenbill.

Shipped at TAMPA, FLORIDA U.S.A.

in apparent good order and condition by UNITED TRADING CORPORATION (U.S.A.)
1725 JEFFERSON DAVIS HIGHWAY, SUITE 206
of ARLINGTON, VIRGINIA
on board the good Vessel called the M/V "WESERMUNDE"
for carriage to AQABA, JORDAN
or so near thereto as she may safely get, the following goods:

82,073 CARTONS FRESH TABLE EGGS 1,878,201.40 GROSS KILOS
1,692,063.00 NET KILOS

"NOTIFY: STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCTS TRADING, BAGHDAD
EVIDINCING SHIPMENT FROM U.S.A. TO BAGHDAD."
"NOTIFY PARTY: SAFSA UNIDA SUD AMERICANO DE COMMERCIO
INTERNACIONAL LTDA.
(LONDON CONTACT OFFICE)
U.T.G. HOUSE, FETCHAM PARK
LOWER ROAD, FETCHAM
LEATHERHEAD, SURREY KT22 9HP U.F.
TELEX NO. 893115/7
"ALSO NOTIFY: RAFIDAIN BANK, KHULLANI BRANCH, BAGHDAD."
"FREIGHT PREPAID
EXPORT LICENSE "G-DEST"
"CREDIT NO. 100412"
"THESE GOODS BEING CARRIED BY REFRIGERATED VESSEL"
"IN TRANSIT TO IRAQ AT CARGOES EXPENSE"
"THE CARRYING STEAMER IS TO THE BEST OF THE OWNERS KNOWLEDGE
NOT INCLUDED IN THE IRAQI GOVERNMENT BLACKLIST."
"ACCORDING TO TERMS AND CONDITIONS OF THE RELEVANT CHARTER PARTY,
QUANTITY AND QUALITY UNKNOWN. CARGO APPARENTLY IN GOOD CONDITION."

ORIGINAL

"CLEAN ON BOARD"
TAMPA, FLORIDA U.S.A.
DATED MARCH 30, 1982

THESE COMMODITIES LICENSED BY U.S. FOR ULTIMATE DESTINATION
IRAQ. DIVERSION CONTRARY TO UNITED STATES LAW PROHIBITED.

which are to be delivered in the like good order and condition at the aforesaid Port of AQABA, JORDAN unto
"TO ORDER OF ALLIED ARAB BANK LTD"
or his or their Assign(s), he or they paying freight at the rate of AS PER CHARTER PARTY
per Charter-Party, dated DECEMBER 18, 1981

All the terms, conditions, liberties, and exceptions of the Charter-Party are herewith incorporated. AS PER CHARTER PARTY DATED DECEMBER 18TH, 1981

This Bill of Lading shall have effect subject to the provisions of any legislation relating to the carriage of goods by sea which incorporates the rules relating to Bills of Lading contained in the international Convention, dated Brussels 25th August, 1924 and which is compulsorily applicable to the contract of carriage herein contained. Such legislation shall be deemed to be incorporated herein, but nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities thereunder. If any term of this Bill of Lading be repugnant to any extent to any legislation by this clause incorporated, such term shall be void to that extent but no further. Nothing in this Bill of Lading shall operate to limit or deprive the Carrier of any statutory protection or exemption from, or limitation of, liability.

Weight, measure, quality, quantity, condition, contents and value unknown.

IN WITNESS whereof the Master or Agent of the said Vessel has signed Bills of Lading all of this tenor and date, any one of which being accomplished the others to be void.

MARCH the 30, 19 82

ELLER & COMPANY, INC.

EXHIBIT "D"

(2)

No. 88-115

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, ET AL.,

Petitioners,

—v.—

STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for permission to file an *amicus curiae* brief in support of the petition for a writ of certiorari filed by The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited and others. Petitioners have given consent, but consent, requested orally, has not been received from Respondent and leave to file must be sought pursuant to Rule 36.1.

NATURE OF APPLICANT'S INTEREST

Applicant has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899. It

has a membership of about 3500 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

MLA's purposes are stated in its Articles of Association:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the eighty-eight years of its existence, has sponsored a wide range of legislation dealing with maritime matters including the Carriage of Goods by Sea Act ("COGSA")[1] and the Federal Arbitration Act.[2] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

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1 46 U.S.C. §§ 1300-1315.

2 9 U.S.C. §§ 1-14.

3 *E.g.*, Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-1175; 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing

MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

MLA has actively participated, as one of some forty-five national maritime law associations constituting the Comite Maritime International,[4] in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions.[5]

MLA believes uniformity in maritime law, both national and international, is of great importance. This concern has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of Maritime Law recommended that steps be taken

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Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 Benedict on Admiralty, Doc. No. 3-4 at 3-34.1 -78.2 (7th ed. 1988) (hereinafter "Benedict"), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); Federal Court Jurisdiction Bill, S. 1876, 93d Cong., 1st Sess. (1973); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

4 These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Egypt, Finland, France, Federal Republic of Germany (West Germany), Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Philippines, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela and Yugoslavia.

5 *E.g.*, Assistance and Salvage (1910), 37 Stat. 1658 (1913); Ocean Bills of Lading (1924), 51 Stat. 233 (1937); Collision (1910), *reprinted in* 6 Benedict, Doc. No. 3-2 at 3-11 -19; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 Benedict, Doc. No. 5-2 at 5-11 -29; Maritime Liens and Mortgages (1967), *reprinted in* 6A Benedict, Doc. No. 8-3 at 8-25 -32; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 Benedict, Doc. No. 6-3 at 6-22.103 -76.1; and Limitation of Liability for Maritime Claims, *reprinted in* 6 Benedict, Doc. 5-4 at 5-32.1 -44.2.

to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including four accepted by the United States Supreme Court.[8]

It is also the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. The Eleventh Circuit Court of Appeals has construed COGSA in a way which seriously diverges from other jurisdictions and is at odds with the strong policy of Congress and this Court in favor of arbitration. Accordingly, we urge that this motion be granted.

MLA CAN MAKE A UNIQUE CONTRIBUTION ON RELEVANT ISSUES.

MLA's perspective, arising from its interest in the uniformity and predictability of U.S. maritime law, necessarily is different from those of the parties to this particular suit, who are most

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6 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

7 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

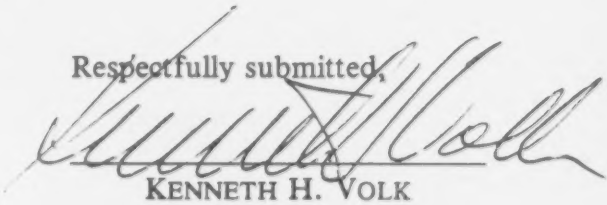
8 *Chick Kam Choo v. Exxon Corp.*, _____ U.S. _____, 108 S. Ct. 1684 100 L.Ed.2d 127 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a complete listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

interested in its outcome as it affects their individual positions. MLA can therefore most effectively treat the need for review by this Court in order to ensure national uniformity on the issues presented.

MLA was an active participant in the drafting and adoption of COGSA and the Federal Arbitration Act, the two pieces of legislation at issue. Thus, MLA can provide a balanced and knowledgeable view on the the most relevant questions and policy considerations at the root of this case.

DATED: August 5, 1988.

Respectfully submitted,



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IN THE

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OCTOBER TERM, 1988

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THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED, ET AL.,

Petitioners,

—v.—

STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petition for Certiorari by The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited; M/V Wesermunde; Marquis Compania Naviera, S.A.; Pateras Brothers, Ltd.; Pateras Investments, S.A.; and Kittiwake Compania Naviera, S.A.

QUESTIONS OF LAW PRESENTED

1. Whether an arbitration clause, incorporated by reference in a contract of ocean carriage, can be in conflict with the provi-

sions of the Carriage of Goods By Sea Act ("COGSA"), 46 U.S.C. §§ 1300-1315, and therefore unenforceable.

2. Whether reference to a specified charter party in a bill of lading is a sufficient incorporation of the charter party's arbitration clause so as to require holders of the bill of lading to arbitrate disputes arising from the bill of lading.

INTEREST OF AMICUS CURIAE

This is stated in the Motion which precedes this Brief.

SUMMARY OF ARGUMENT

In view of the number of congressional and judicial pronouncements strongly favoring arbitration, both domestic and international, the Eleventh Circuit's perception of a conflict between arbitration statutes and COGSA presents important issues that should be addressed by this Court.

The holding of the Court of Appeals for the Eleventh Circuit that a bill of lading holder was not bound by an arbitration clause in a charter party incorporated by reference into the bill unless the holder had "actual notice" of the clause, is contrary to the holdings in other Circuits. Accordingly, review by this Court is necessary to resolve the conflict among Circuits.

ARGUMENT

1. APPLICATION OF COGSA TO PRECLUDE ARBITRATION RAISES IMPORTANT ISSUES.

COGSA is the American enactment of the Hague Rules and applies "to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade." 46 U.S.C. § 1312. It sets out a number of rules governing risk allocation in the event of loss of or damage to cargo. *E.g.*, 46 U.S.C. § 1304. Although it permits a certain freedom of contracting out of its terms, 46 U.S.C. § 1305, COGSA expressly prohibits any

agreement relieving the carrier of liability "or lessening such liability" as would otherwise arise from the Act. 46 U.S.C. § 1303(8). In the instant case, the Eleventh Circuit held that a clause in the contract requiring arbitration in London *does* lessen the carrier's exposure to liability and is therefore unenforceable. *State Establishment for Agricultural Product Trading v. M/V Wesermunde*, 838 F.2d 1576, 1581-82 (11th Cir. 1988).

The only authority cited for this proposition is *Indussa Corporation v. S.S. Ranborg*, 377 F.2d 200 (2d Cir. 1967), in which the Second Circuit sitting *en banc* determined that a contract of carriage requiring that a cargo claim be tried in a foreign court runs afoul of COGSA. The court, however, qualified its holding by saying:

> Our ruling does not touch the question of arbitration clauses in bills of lading which require this to be held abroad. The validity of such a clause in a charter party, or in a bill of lading effectively incorporating such a clause in a charter party, has been frequently sustained. See Lowry & Co. v. S.S. Le Moyne D'Iberville, 253 F. Supp. 396 (S.D.N.Y.1966), appeal dismissed for want of jurisdiction, 372 F.2d 123 (2 Cir. 1967), slip opinions 1103, and cases cited. Although the Federal Arbitration Act adopted in 1925, 43 Stat. 883, validated a written arbitration provision "in any maritime transaction", § 2, and defined that phrase to include "bills of lading of water carriers," § 1, COGSA, enacted in 1936, 49 Stat. 1207, made no reference to that form of procedure. If there be any inconsistency between the two acts, presumably the Arbitration Act would prevail by virtue of its reenactment as positive law in 1947, 61 Stat. 669. See Knauth, Ocean Bills of Lading, supra, at 238-239.

Id. at 204 n.4.

The *Wesermunde* decision is the first to reach the conclusion that a foreign arbitration clause is a "lessening" of the carrier's obligations under COGSA and seems to be at odds with legislation enacted by Congress strongly supporting arbitration. *See* 9

U.S.C. §§ 1-14. Section 2 of the Federal Arbitration Act provides:

> *A written provision in any maritime transaction* or a contract evidencing a transaction involving commerce *to settle by arbitration a controversy thereafter arising out of such contract or transaction*, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). The section makes no distinction between arbitration clauses specifying arbitration in the United States and those naming a forum abroad. *See also, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629-31 (1985).

A further expression of strong congressional support of arbitration is found in the Recognition and Enforcement of Foreign Arbitral Awards Convention, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3, *reprinted in* 6 Benedict on Admiralty, Doc. No. 7-3 at 7-16 -20 (7th ed. 1988), which was incorporated into our national laws in 1970.[9] 9 U.S.C. §§ 201-208. Article II(1) of the Convention states:

> Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Since both of the arbitration statutes were enacted subsequent to COGSA without any indication of an intention to limit their effect by reason of COGSA, it would seem clear that the

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9 England and Greece are also signatories. 6 Benedict on Admiralty, Doc. No. 7-3 at 7-21 -22 (7th ed. 1988).

will of Congress has been thwarted by the decision of the Eleventh Circuit.

Our courts, led by this Court, have also strongly endorsed the arbitral process. In the case of *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1982), the Court, in speaking of the Federal Arbitration Act, said:

> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id. at 24-25 (footnote omitted). And in *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 650 (1985), the Court said:

> Finally, it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrier & Gulf*, 363 U.S., at 582-583. See also *Gateway Coal Co.* v. *Mine Workers*, *supra*, at 377-378.

The case of *Shearson/American Exp., Inc. v. McMahon*, ____ U.S. ____, 107 S. Ct. 2332, 96 L.Ed.2d 185 (1987), contains the Court's most recent expression strongly favoring arbitration. *See also Mitsubishi Motors*, 473 U.S. at 629-31; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218-21 (1985).

The decision of the Eleventh Circuit relies upon COGSA to frustrate the strong legislative policy favoring arbitration and

this Court's broad application of the Federal Arbitration Act. For those reasons alone the case is worthy of review.[10]

2. THE STANDARD USED BY THE ELEVENTH CIRCUIT TO DETERMINE WHETHER THE CHARTER'S ARBITRATION CLAUSE WAS SUFFICIENTLY INCORPORATED INTO THE BILL OF LADING IS CONTRARY TO THE ESTABLISHED LAW IN OTHER CIRCUITS.

The Eleventh Circuit held that there is an "implied policy" in COGSA that suit may be brought in the United States, notwithstanding an arbitration clause, unless "actual notice" is given that such a clause has been incorporated by reference into the contract of carriage. *Wesermunde*, 838 F.2d at 1581-82. This is contrary to decisions of other circuits which have held that charter party terms may be generally incorporated into the bill of lading by reference and are a binding part of the contract. All that is required is that there be an express reference to the charter party on the face of the bill of lading. That is sufficient to put the holder of the bill of lading on notice. There is no requirement that each and every clause of the charter party be brought to the bill of lading holder's attention, as the Eleventh Circuit would have it. Such a requirement would greatly multiply the number of proceedings arising from the same events and transactions, and could seriously disrupt maritime commerce.

The leading case is *Son Shipping Co., Inc. v. De Fosse and Tanghe*, 199 F.2d 687 (2d Cir. 1952). The question was whether an arbitration clause in a charter party was sufficiently incorporated in bills of lading so that the provisions for arbitration in the charter party were enforceable. The order bills of lading provided in part as follows:

> "This shipment is carried under and pursuant to the terms of the charter dated Antwerp, June 29th, 1948 between Son Shipping Company and De Fosse & Tanghe,

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10 The House of Lords recently wrestled with this problem in *The Hollandia*, [1983] 1 A.C. 565, 576 (H.L.(E)), without coming to any conclusion on the point.

> charterer, and all the terms whatsoever of the said charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment."

Id. at 688. In holding that the charter party's arbitration clause was enforceable against the bill of lading holder the Second Circuit said:

> Where terms of the charter party are, as here, expressly incorporated into the bills of lading they are a part of the contract of carriage and are binding upon those making claim for damages for the breach of that contract just as they would be if the dispute were between the charterer and the shipowner.

Id. (citations omitted).

Son Shipping has been followed by many courts. In *Castle & Cooke, Inc. v. Etoile Shipping Co.*, 622 F. Supp. 609, 610 (D.P.R. 1985), the court said:

> It is well settled that where "the terms of the charter party are . . . expressly incorporated into the bills of lading they are part of the contract of carriage and are binding upon those making a claim for damages for breach of the contract . . ." *Son Shipping Co. v. DeFosse & Tanghe*, 199 F.2d 687, 688 (2nd Cir.1952); *see also*, *Bunge Corp. v. Stalt Hippo*, 1980 AMC 2611, 2614 (S.D.N.Y. 1980); *Midland Tar Distillers, Inc. v. M/T Lotos*, 1973 A.M.C. 1924 (S.D.N.Y. 1973); *Mitsubishi Shoji Kaisha Ltd. v. M/S Galini*, 323 F. Supp. 79, 82 (S.D. Tex. 1971); *Michael v. S.S. Thanasis*, 311 F. Supp. 170, 173 (N.D. Calif. 1970); *Lowry & Co. v. LeMoyne D'Iberville*, 253 F. Supp. 396, 398 (S.D.N.Y. 1966). To compel arbitration pursuant to a clause in a charter party it is not necessary for the claimant to be a party to the charter agreement. Bunge, *supra*, at 2614. It is enough that the clause was unequivocally incorporated in the bill of lading and the shipper was aware of the incorporation. *SS Thanasis*, *supra*, at 173.

In the case of *Michael v. S.S. Thanasis*, 311 F. Supp. 170 (N.D. Cal. 1970), referred to in *Castle & Cooke*, the court quoted and followed *Son Shipping* and compelled arbitration. 311 F. Supp. at 173-74. There, as here, the incorporation of the charter party by reference was in broad general terms. *See id.* at 172. The court noted "that there has been no showing that the plaintiffs are unfamiliar with maritime procedures or other common commercial transactions" and concluded "that it is reasonable under the circumstances here to assume that the plaintiffs were aware or should have been aware of the provisions in the bills of lading which they purchased." *Id.* at 174.

The Eleventh Circuit's holding that the bill of lading holder must have "actual notice"[11] of the arbitration clause if it is to be enforceable is thus in direct conflict with the *Son Shipping* line of authority and review by this Court is therefore merited in order to resolve a conflict among the Circuits.

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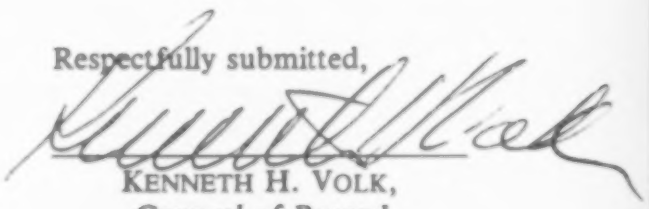
11 The Circuit Court's contention, in justification, that "actual notice" of the applicability of COGSA was given on the face of the bill of lading is inaccurate. *Compare* 838 F.2d at 1582 *with id.* at 1580 n.1. The bill itself does not mention COGSA, only "legislation relating to the carriage of goods by sea . . . which is *compulsorily* applicable . . . ." *Id.* at 1580 n.1 (emphasis added). As the Circuit Court points out, this was a contract of private carriage, *id.* at 1580, and therefore, provided the bills were not negotiated, COGSA was not applicable on its own terms, *id.*, even assuming COGSA to be the "legislation" involved.

CONCLUSION

We most respectfully urge this Honorable Court to grant the Petition for Certiorari.

Dated: August 5, 1988.

Respectfully submitted,



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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City of Brooklyn and the County of Kings; I am over the age of eighteen years and not a party to the within action; my business address is: One Battery Park Plaza, New York, New York 10004.

On August 5, 1988, I served the within Motion to File *Amicus Curiae* Brief and Brief in Support of the Petition for a Writ of Certiorari in "The United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited, et al. vs. State Establishment for Agricultural Product Trading" in the United States Supreme Court, October Term 1988, No. 88-115, on the Parties in said action by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at New York, New York, addressed as follows:

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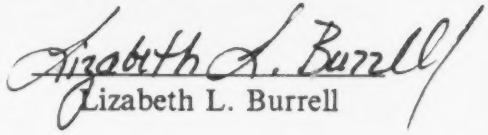
All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on August 5, 1988, at New York, New York.



Elizabeth L. Burrell

(3)

No. 88-115

In The

Supreme Court of the United States

October Term, 1988

THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED,

Petitioner,

vs.

STATE ESTABLISHMENT FOR AGRICULTURAL PRODUCT TRADING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN RESPONSE TO PETITION OF THE UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION (BERMUDA) LIMITED FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

State Establishment generally accepts the Statement of the Case set forth in Petitioner's brief, but notes that a more objective presentation of the facts is recited in the underlying decision of the Eleventh Circuit Court of Appeals. Several statements made by Petitioner do need correction and clarification.

First, Petitioner failed to point out that State Establishment was not a signatory to the charter party and that the bill of lading contained no arbitration clause; rather, it only obliquely referenced the Charter Party between Marquis Compania Naviera, S.A. and Murray Clayton, Limited, dated December 18, 1981, which required the shipowner to arbitrate disputes with the charterer. Moreover, Petitioner ignores the fact that State Establishment never agreed to arbitrate its disputes, it was never given a copy of the charter party, and it had no knowledge that the charter party contained an arbitration agreement, much less that it required arbitration in a foreign forum that had no nexus whatsoever to the dispute between the parties.

Second, Petitioner implies that State Establishment openly flouted the orders of the district court and chose not to submit its claim to arbitration. The undisputed fact is that State Establishment was not entitled to arbitrate this dispute, and the English arbitrators had no jurisdiction to proceed with this matter. Even Petitioner's English attorney conceded in the lower court that an English court would conclude that State Establishment was not required to arbitrate disputes under the bill of lading.

The Maritime Law Association of the United States has filed a motion to file amicus curiae brief and brief in support of the petition for writ of certiorari pursuant to Supreme Court Rule 36, which Respondent opposes. This motion has not yet been ruled upon by the Court, but in the event it is granted, Respondent will file a response.

SUMMARY OF ARGUMENT

Petitioner argues that the Eleventh Circuit's decision is contrary to the federal policy favoring arbitration. Respondent submits that the decision below, which merely holds that a cargo owner cannot be relegated to arbitration in a foreign forum having nothing whatsoever to do with the transaction, by the purported incorporation into the bill of lading of a document between third parties which he has never seen, in no way detracts from such a policy. Indeed, the Eleventh Circuit expressly acknowledged the strong federal policy in favor of enforcing arbitration agreements, and found that arbitration in and of itself was not per se violative of the Carriage of Goods by Sea Act (COGSA).

This Court has long recognized that the Federal Arbitration Act does not compel arbitration when such a result would interfere with other important federal policies. In the present case, compelling arbitration in a foreign forum that has no connection with either the performance or execution of the bill of lading would conflict with the aim and purpose of the congressional mandate in COGSA, which prevent carriers from lessening their liability.

COGSA was promulgated by Congress as part of an international effort to achieve uniformity and simplication of bills of lading used in international trade. It was intended to reduce uncertainty concerning the responsibilities and liabilities of carriers, the responsibilities and rights of shippers, and the liabilities of underwriters who insure waterborne cargo. By strictly circumscribing the ability of carriers to avoid liability for cargoes in their care, COGSA also greatly enhances the negotiability of bills of lading.

In giving deference to the strong federal policies behind COGSA, the Eleventh Circuit aligned itself with all of the other Circuit Courts which have addressed the issue, and consistently held that a foreign forum selection clause in a bill of lading is unenforceable under COGSA because it lessens the risk of the carrier's liability. Such a clause is also unenforceable under COGSA because it impermissibly deprives State Establishment of its right to have the dispute heard in a U.S. forum. In addition, State Establishment had no actual notice of the existence of the clause. State Establishment was never provided with a copy of the charter party, and the bill of lading was simply an adhesion contract which did not disclose the possibility that an oblique reference to the charter party might be a "booby trap" requiring foreign arbitration. These facts, as well as the limited scope of the arbitration clause at issue, distinguish this case from the decisions relied upon by Petitioner, and present no conflict for resolution by this Court.

———o———

REASONS FOR NOT GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION THAT AN ARBITRATION CLAUSE REQUIRING ARBITRATION IN A FOREIGN FORUM HAVING NO NEXUS TO THE TRANSACTION CONFLICTS WITH IMPORTANT FEDERAL POLICIES PROMULGATED IN COGSA IN NO WAY UNDERMINES THE DECISIONS OF THIS COURT WHICH GENERALLY FAVOR ARBITRATION.

In *State Establishment for Agricultural Product Trading v. Wesermunde,* 838 F.2d 1576 (11th Cir. 1988), the Eleventh Circuit held that a clause requiring arbitration in a foreign country having no connection to either the performance, negotiation or execution of a bill of lading conflicts with the express purpose of COGSA which is to prevent carriers from lessening their risk of liability. The lower court reasoned that requiring a consignee to assert a claim in a foreign forum, where COGSA may not be applied or applied in a manner inconsistent with U.S. interpretations of the Act, would substantially lessen a carrier's liability. In so holding, the Eleventh Circuit noted that arbitration in and of itself was not per se violative of COGSA's provisions.

Petitioner submits that the Eleventh Circuit, in adjudging the arbitration clause in *WESERMUNDE* unenforceable, failed to give proper deference to the federal policy favoring arbitration, pursuant to the Federal Arbitration Act. Petitioner bases its argument on a misconstruction of cases from this Court which involve arbitration in another context, and has relied on the general principle that the federal courts favor arbitration to sug-

gest that any case which refuses arbitration on any ground undermines the precedent of this Court. This Court, as well as the lower courts, have refused to order arbitration when arbitration interferes with other important federal policies.

One illustration is *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953), where this Court held that a claim made under § 12(2) of the Securities Act of 1933 was not arbitrable even though the securities sales contract contained an arbitration clause. According to this Court, a contractual provision obligating a buyer to waive enforcement of the Securities Act of 1933 was void under the express terms of the Act. Thus, requiring arbitration would deprive the investor of his statutory right to enforcement of the Act in courts of competent jurisdiction, and undermine the very purpose of the Act.

In resolving the conflict in favor of the Securities Act and in voiding the arbitration provision in *Wilko*, the Court examined the legislative history of the Securities Act, and found that it was promulgated to protect investors from more sophisticated and knowledgeable issuers and dealers. This Court reasoned that in waiving a judicial forum, an investor would surrender an advantage of the Securities Act—choice of courts and venue. This is precisely the advantage COGSA intended to give to the consignee by prohibiting deprivation of its right to have cargo disputes resolved in a U.S. forum. *See also Bache Halsey Stuart, Inc. v. French*, 425 F. Supp. 1231, 1234 (D.D.C. 1977) (arbitration of claim under Commodity Act was inconsistent with statutory specification of alternate forum).

In contrast, the authorities which Petitioner cites are factually and legally inapposite to the case at bar, and do not present a conflict with the Eleventh Circuit's decision for several reasons. First, none of the decisions involved COGSA, and the interpretation of the congressional mandate that no clause in a bill of lading can operate to lessen a carrier's liability. Second, none of the decisions addressed the propriety of requiring arbitration in a *foreign* forum that had absolutely no significant relationship to the underlying transaction. Third, and perhaps most important, there was no question in any of the decisions cited by Petitioner that *both* parties had expressly agreed to arbitrate their disputes, and the arbitration clause was actually contained in the underlying agreement (rather than obliquely referenced in an agreement between third parties which had never been seen by the party opposing arbitration).

For example, *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed. 2d 765 (1983) involved the stay of an arbitration dispute which arose from a construction contract signed by both of the parties to the dispute. Neither a foreign arbitration clause, nor a federal statute conflicting with the Federal Arbitration Act was involved. *Shearson/American Express, Inc. v. McMahon,* 482 U.S. —, 107 S.Ct. 2332, 96 L.Ed. 2d 185 (1987) also involved a domestic arbitration clause. *Shearson* holds that the *implied* right of action provided by § 10(b) of the Securities Exchange Act of 1934 does not prevent arbitration, but it does not overrule the principles enunciated in *Wilko* that arbitration may be inappropriate when it interferes with a conflicting policy expressly protected by a federal statute. *Scherk v.*

Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed. 2d 270 (1974) arose from an international contract for the sale of European business enterprises between parties of significant bargaining strength. Considerable uncertainty existed as to whether U.S. law even applied, and there was clearly no conflict between any federal statute and the Federal Arbitration Act. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed. 2d 444 (1985) was an anti-trust suit which concerned an international sales agreement. This Court cited *Wilko* with approval, but found no federal policy against arbitration in the anti-trust statute. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed. 2d 158 (1985) involved a domestic arbitration agreement signed by both parties, and was limited to a discussion of state securities law. *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed. 2d 648 (1986) arose from a domestic collective bargaining agreement, and the division of responsibility between the courts and arbitrators.

Petitioner has attempted to divert the Court's attention from the facts and legal precedents which are actually being presented for review by relying on broad generalizations to create a specific conflict. On several occasions in its brief, Petitioner makes the erroneous statement that the Eleventh Circuit disregarded this Court's decisions reflecting and implementing a congressional policy favoring arbitration. Petitioner also claims that the Eleventh Circuit "apparently would refuse to enforce an arbitration provision in any contract of carriage" where COGSA was involved. The fallacy of these observations becomes readily apparent upon even a cursory examination of the Eleventh Circuit's decision:

> While we do not believe that arbitration in and of itself is *per se* violative of COGSA's provisions, especially in light of Congress' encouragement of arbitration by its enactment of the Arbitration Act, 9 U.S.C. § 51-14 (1970), the court does believe that a provision requiring arbitration in a *foreign* country that has no connection with either the performance of the bill of lading contract or the making of the bill of lading contract is a provision that would conflict with COGSA's general purpose of not allowing carriers to lessen their risk of liability. (emphasis in original).

In so holding, the Eleventh Circuit cited the decision of this Court in *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 217-221, 105 S.Ct. 1238, 1240-43, 84 L.Ed. 2d 158 (1985) and recognized the strong federal policy in favor of enforcing arbitration agreements. It had no hostility to the general enforcement of arbitration agreements, and contrary to the Petitioner's argument, the Eleventh Circuit was not concerned that the arbitration clause deprived State Establishment of its day in court, but rather, that it lessened the carrier's liability and deprived State Establishment of its statutory right to a U.S. forum.

Although ignored by Petitioner, the Eleventh Circuit made the independent finding that even if the provision requiring arbitration in London, England did not expressly conflict with COGSA's requirement that a carrier may not lessen its liability, a clause requiring foreign arbitration arguably conflicts with COGSA's implied policy that an American forum will be made available to a consignee when a bill of lading is issued subject to the terms of COGSA. Where such a conflict exists, the Circuit Courts have consistently held that, at a minimum, the consignee must be given actual notice of the conflicting provision before en-

tering into the contract. *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697 (11th Cir. 1986), *cert. denied*, — U.S. —, 107 S.Ct. 1577, 94 L.Ed. 2d 768 (1987); *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983). *Accord, Siderius, Inc. v. M.V. Ida Prima*, 613 F. Supp. 916 (S.D.N.Y. 1985); *Pacific Lumber & Shipping Co., Inc. v. Star Shipping*, 464 F. Supp. 1314 (W.D. Wash. 1979). Petitioner has not even suggested that this finding is inconsistent with the precedents of this Court, or any other court.

II. THE ELEVENTH CIRCUIT'S DECISION THAT AN ARBITRATION CLAUSE REQUIRING ARBITRATION IN A FOREIGN FORUM IS VIOLATIVE OF COGSA IS CONSISTENT WITH THE PRIOR DECISIONS OF THE CIRCUIT COURTS.

The principles which governed the Eleventh Circuit's decision have been consistently adopted by the lower courts. An arbitration clause in an interstate carrier's standard-form bill of lading was voided on similar policy grounds in *Aaacon Auto Transport, Inc. v. State Farm Mutual Automobile Insurance Co.*, 537 F.2d 648 (2d Cir. 1976) *cert. denied*, 429 U.S. 1042, 97 S.Ct. 742, 50 L.Ed.2d 754 (1977). Section 20(11) of the Interstate Commerce Act provides that any limitation of liability without respect to manner or form in which it is sought to be made is invalid and void. The legislative history of the section indicates that § 20(11) was a remedial statute which, in part, provided shippers in interstate commerce with the right to litigate against a carrier in forums convenient for the shipper.

In *Indussa Corp. v. S.S. Ranborg,* 377 F.2d 200 (2d Cir. 1967) (en banc), the Second Circuit Court of Appeals voided a foreign forum selection clause in a bill of lading as inconsistent with Section 3(8) of COGSA, which prohibits any provision in a contract of carriage from lessening the carrier's liability for negligence, fault or dereliction of statutory duties otherwise than as provided in the Act. According to the Court:

> From a practical standpoint, to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially . . . and thus is an effective means for carriers to secure settlements lower than if cargo could sue in a convenient forum. *Id.* at 203.

Petitioner has attempted to diminish the importance of *Indussa,* since the Second Circuit noted in a footnote that the ruling did not "touch the question" of arbitration clauses in bills of lading, which require arbitration to be held abroad. 377 F.2d at 204 n.4. Petitioners neglect to note, however, that the Second Circuit subsequently pointed out in *Aaacon,* 537 F.2d at 655, that the thrust of this footnote had been primarily directed to commercial situations where the bargaining power was roughly equal, which was not normally the case with shipping contracts.

In the case at bar, the bargaining power was not equal, and the footnote reservation in *Indussa* does not apply. There was no bargaining. State Establishment was not even provided with a copy of the charter which contained the arbitration clause. The bill of lading made specific reference to COGSA but contained no meaningful notice that the charter party contained a provision requiring arbitration, let alone arbitration in London, England. State

Establishment was given no indication that it would be required to travel to a distant forum, which had absolutely no nexus with the bill of lading, to enforce the rights that were specifically written into the bill of lading.

The support given by *Indussa* to the decision below is recognized by the leading authorities in this field. Gilmore and Black in *The Law of Admiralty*, § 3-25 at 146 n.23 (2d ed. 1975) cite *Indussa* and suggest that arbitration clauses incorporated into bills of lading which unduly restrict a cargo owner's right to relief seem to be "clearly out of line with *Indussa.*"

In *Siderius, Inc. v. M.V. Ida Prima*, 613 F. Supp. 916 (S.D.N.Y. 1985), the court relied upon Gilmore and Black's interpretation of *Indussa* and upon *Aaacon* in holding that a consignee was not bound by a foreign arbitration clause, since it diminished the protection provided by COGSA. The court opined:

> . . . it must be recognized that the consignee under a bill of lading did not bargain with the carrier at all. If the policies of the Arbitration Act and COGSA conflict as to the enforcement of the arbitration clause, it seems to be a weak case for enforcement of the Arbitration Act against a party who did not agree to arbitrate, while it is a strong case for enforcing COGSA in favor of the consignee—an intended beneficiary of its provisions. I believe in those circumstances that the command of COGSA should be held to prevail over that of the Arbitration Act. *Id.* at 920.

In so holding, the court noted that *Aaacon* substantially undercut the suggestion in *Indussa* that such arbitration clauses in an ocean bill of lading might be valid. *Accord, Pacific Lumber & Shipping Co., Inc. v. Star Shipping*, 464

F. Supp. 1314 (W.D. Wash. 1979); *Mitsui & Co. v. M/V Glory River,* 464 F. Supp. 1004 (W.D. Wash. 1978); *Northern Assurance Co. v. M/V Caspian Career,* 1977 A.M.C. 421 (N.D. Cal. 1977).

Recently, the Fifth Circuit Court of Appeals, in *Conklin & Garrett, Ltd. v. M/V Finnrose,* 826 F.2d 1441 (5th Cir. 1987), followed *Indussa* and invalidated a foreign forum selection clause in a bill of lading. The court reasoned that forum selection clauses lessen the liability of the shipper, and are therefore violative of the express command of COGSA. The court found that it was entirely unrealistic to believe that no reduction in the carrier's liability would occur if the cargo owner were required to sue the carrier for damaged cargo in a foreign forum. *Accord, Hughes Drilling Fluids v. M/V Luo Fu Shan,* 852 F.2d 840 (5th Cir. 1988); *Union Insurance Society of Canton, Ltd. v. S.S. Elikon,* 642 F.2d 721 (4th Cir. 1981); *C.A. Seguros Orinoco v. Naviera Transpapel, C.A.,* 677 F. Supp. 675 (D.P.R. 1988). This is precisely what the Petitioner attempted to do in the present case by securing arbitration in a foreign forum having no connection whatsoever with the bill of lading or the dispute between the parties.

The correctness of the lower court's decision is further confirmed by an examination of the important federal policies behind COGSA. As stated by the Eleventh Circuit below:

> The congressional purpose underlying COGSA was part of an international effort to achieve uniformity and simplification of bills of lading used in international trade. *Robert C. Herd & Co. v. Krawill Machinery Corp.,* 359 U.S. 297, 301, 79 S.Ct. 766, 769, 3 L.Ed.2d 820, 823 (1959). It was intended to reduce

> uncertainty concerning the responsibilities and rights of shippers. By strictly circumscribing the ability of carriers to avoid liability for cargoes in their care, COGSA also enhanced the negotiability of bills of lading. *Wirth Ltd. v. S.S. Acadia Forest,* 537 F.2d 1272, 1276-79 (5th Cir. 1976); *Portland Fish Co. v. States Steamship Co.,* 510 F.2d 628, 631-33 (9th Cir. 1974).

Enforcement of a foreign arbitration clause would certainly undermine these policies, especially where the shipper had no actual knowledge that disputes must be decided in a foreign forum with no relation whatsoever to the transaction. Foreign arbitrators may or may not enforce COGSA, or if they did, may not interpret it in the same manner as the drafters intended, or enforced it in the same manner as in U.S. courts. Requiring State Establishment to journey to London, England to assert its claim is wholly unreasonable, unrealistic and impractical, and puts a high hurdle in the way of enforcing liability, in outright contravention of COGSA. Consideration of these factors has led the Eleventh, Fifth, Fourth and Second Circuits all to recognize that COGSA does not permit the carrier to lessen his liability or to avoid a U.S. forum by requiring the consignee to arbitrate or litigate his disputes abroad, particularly where the consignee has no notice of the arbitration provision.

Petitioner has cited a host of district court decisions and one Second Circuit decision, *Son Shipping Co. v. De Fosse & Tanghe,* 199 F.2d 687 (2d Cir. 1952), in support of its position that the ruling of the Eleventh Circuit conflicts with the First, Second, Fifth and Ninth Circuits. One must question Petitioner's efforts to suggest that a conflict exists in the First, Fifth and Ninth Circuits based solely on district court decisions.

The simple fact is that no decision in any of those circuits remotely conflicts with the Eleventh Circuit's opinion, and with regard to the Second Circuit, *Son Shipping* is factually distinct on three grounds. First, the arbitration clause called for arbitration in New York, a U.S. forum, and not some distant, foreign forum having no connection whatsoever to the transaction. The Second Circuit's subsequent decisions in *Indussa* and *Aaacon*, which specifically invalidated clauses that required resort to a foreign forum, are therefore controlling in this case. Second, it was the charterer in *Son Shipping* who sought arbitration, not the holder of the bill of lading. Third, the charter party in *Son Shipping* broadly provided for arbitration of: "Any and all differences and disputes of whatsoever nature arising out of this charter," *id.* at 688, while the arbitration clause in the case at bar applied only to disputes between the ship owner and the charterer, and then only to disputes which were "under the charter party." Even the Petitioner's English lawyer conceded that the arbitration clause in the charter party in the present case would not require arbitration between the parties to the bill of lading.

Recently, the Court in *Continental U.K., Ltd. v. Anagel Confidence Compania Naviera, S.A.*, 658 F. Supp. 809 (S.D.N.Y. 1987) held invalid as to non-signatories like State Establishment an arbitration clause providing for arbitration of disputes arising between only Owners and Charterers. The Court reasoned:

> . . . where the restrictive owner/charterer language is used in the arbitration clause, it is difficult to bind to the clause, one who is not a signatory to the charter party . . . The court has discovered only a few cases

> in addition to those cited by the parties where the narrow scope owners and charterers' language was at issue . . . Arbitration was ordered in only two of these cases . . . In both cases, the nonsignatory had expressly assumed the obligations of the owner or charterer or was otherwise bound by general agency law or contract principals. *Id.* at 814.

Further, while a dispute with a consignee for damages or destroyed cargo might be said to "arise out of" the charter since the charter party authorized the shipment and the bill of lading is collateral to the charter party, such a dispute does not arise "under" the charter party—it arises under the bill of lading. To hold otherwise would negate the fact that the charter party and the bill of lading were two separate and distinct contracts, and there are numerous provisions of the charter party that are personal to the parties thereto and not assumed by a consignee (e.g., freight payment, specifications of the ship, duration of the charter, late days and demurrage charges). Neither State Establishment nor any other consignee should be expected to interpret an arbitration clause relating to disputes "under the charter party", as covering a claim for damage to the cargo covered by a bill of lading expressly incorporating COGSA. *E.g., Production Steel Company of Illinois v. S.S. Francois Ltd.,* 294 F. Supp. 200, 201-02 (S.D.N.Y. 1968); *Savannah Sugar Refining Corp. v. SS Hudson Deep,* 288 F. Supp. 181, 183 (S.D.N.Y. 1968); *Alcoa Steamship Co. v. M/V Nordic Regent,* 453 F. Supp. 10, 12 (S.D. N.Y. 1978).

Other cases cited by Petitioner, *Tai Ping Insurance Co. v. M/V Warschau,* 731 F.2d 1141 (5th Cir. 1984); *Castle & Cooke, Inc. v. Etoile Shipping Co., Ltd.,* 622 F.

Supp. 609 (D.P.R. 1985); *Associated Metals and Minerals Corp. v. M/V Venture*, 554 F. Supp. 281 (E.D. La. 1983); *Mitsubishi Shoji Kaisha, Ltd. v. M.S. Galini*, 323 F. Supp. 79 (S.D. Tex. 1971) all contained a broader arbitration clause. These cases, as well as *Michael v. SS Thanasis*, 311 F. Supp. 170 (N.D. Cal. 1970), are also distinguishable because either (1) no foreign forum was implicated; (2) COGSA was not applicable, or a conflict with its provisions was not raised; (3) the shipper had actual knowledge of the arbitration clause; or (4) the propriety of arbitration was not at issue.

Petitioner also relies on the district court case of *AIU Insurance Co. v. M/V Stamy*, Civ. No. 85-706 (E.D. La. June 24, 1988), which was rendered before the controlling opinion in *Hughes Drilling Fluids v. M/V Luo Fu Shan*, 852 F.2d 840 (5th Cir. 1988). In *Hughes*, the Fifth Circuit held that a clause in the bill of lading which designated China as the forum for any dispute was unenforceable as violative of COGSA. In addition, Petitioner fails to mention that the *AIU court*, itself, distinguished *WESERMUNDE*:

> Further, this Court finds this situation distinguishable from that in *WESERMUNDE*. The agreement in that case was specifically determined to be a form clause of an adhesion contract. That court found that "[n]o reference is made to arbitration in bills of lading. Nothing alerts State Establishment's attention to the possibility that the reference to the charter party may be a 'booby trap,' and, of course, there is no evidence that State Establishment was provided with a copy of the charter party. Here, plaintiffs have made no allegations that a copy of the charter party was not provided, there is no evidence that this was a contract of adhesion, and the arbitration clause is clearly referred to on the face of the bill of lading.

CONCLUSION

Respondent respectfully requests that this Court reject the petition for Writ of Certiorari filed by The United Kingdom Mutual Steamship Assurance Association.

Respectfully submitted,

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